

October 11, 2019

TO: Republican Members, Committee on Energy and Commerce

FROM: Committee Republican Staff

RE: Hearing on “Fostering a Healthier Internet to Protect Consumers.”

I. INTRODUCTION

The Committee on Energy and Commerce will hold a hearing on Wednesday, October 16, 2019, at 10:00 a.m. in 2123 Rayburn House Office Building. The hearing is entitled “Fostering a Healthier Internet to Protect Consumers.”

II. WITNESS

- Danielle Keats Citron, Professor of Law, Boston University School of Law
- Katherine Oyama, Global Head of Intellectual Property Policy, Google, Inc.
- Steve Huffman, Co-Founder and CEO, Reddit
- Corynne McSherry, Legal Director, Electronic Frontier Foundation
- Hany Farid, Professor, University of California, Berkeley, School of Electrical Engineering & Computer Science and School of Engineering
- Gretchen S. Peters, Executive Director, Alliance to Counter Crime Online

III. BACKGROUND AND DISCUSSION

A. Communications Decency Act Section 230

The Communications Decency Act (CDA) was enacted as Title V of the Telecommunications Act of 1996.¹ Much of the original Title V was struck down,² but a key section remains—Section 230.³ Section 230(c)(1) of the Communications Act provides a liability shield to “interactive computer services” from being treated as a publisher or speaker of any information provided by another information content provider,⁴ often interpreted to mean “user generated content.” Section 230(c)(2) of the Communications Act provides a civil liability safe harbor for “interactive computer services” that voluntarily, in good faith, take actions to restrict access to obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable content.⁵

¹ P.L. 104-104, Telecommunications Act of 1996.

² *See, Reno v. ACLU*, 521 US 84 (1997)

³ 47 U.S.C. § 230

⁴ *Id.*

⁵ *Id.*

1. Case Law: The “Sword” and the “Shield.”

A few critical cases highlight the origins of CDA 230, its intention, and how it has evolved from the original intent to a more expansive liability protection that currently exists. Prior to CDA 230’s enactment, Prodigy, an early “interactive computer service” filtered defamatory or offensive content from its platform. Arguing in *Stratton Oakmont v. Prodigy Services Co.* that it was not strictly liable as a publisher of defamatory speech, Prodigy claimed there was no feasible way to moderate all of the content on its platform. The court, siding with Stratton Oakmont, held that Prodigy lost its protection as a distributor and gained liability as a publisher when it made editorial judgments about filtering content that could appear on its platform. On the other hand, CompuServe, another early “interactive computer service,” was not held liable for defamatory content on its platform in *Cubby, Inc. v. CompuServe Inc.* because it did not engage in such editorial decisions and was thus a distributor and not a publisher like Prodigy.⁶ As a means to address these decisions, as well as obscenity on the burgeoning Internet, Congress included Section 230 to balance the need for creating a safe harbor for small Internet companies to innovate and flourish without fear of insurmountable legal fees, while also keeping the Internet clear of offensive and violent content by empowering Internet platforms to take action to clean up their own site.⁷ This has often been referred to as the “shield and sword,” where platforms receive a “shield” from liability for using the ability to self-regulate, or the “sword” that CDA 230 provides them.

Critically, the Section 230 regime sought to empower Internet platforms to self-regulate under a light-touch framework in exchange for liability protection.⁸ However, shortly after its enactment, two critical court cases crystalized a broad interpretation of the liability protection that set the stage for later courts to do the same: *Zeran v. AOL*⁹ and *Blumenthal v. Drudge*.¹⁰ While the authors intended this liability protection to incentivize “interactive computer services” to patrol their platforms,¹¹ it was not intended to be interpreted as an unlimited, broad liability protection absent any good faith action to maintain accountability. For example, in *Zeran v. AOL*, some Section 230 legal scholars point out that:

Section 230’s statutory language was not 100% clear, putting the courts in the position of deciding how broadly or narrowly to interpret its scope. This ruling by the Fourth Circuit Court of Appeals, coming a little over a year after Congress enacted the law, read Section 230’s scope expansively—setting the template for all future courts to do the same.¹²

⁶ *Cubby, Inc. v. CompuServe Inc.*, 776 F. Supp. 135 (S.D.N.Y. 1991)

⁷ H. Rept. 104-458.

⁸ In the legislative text, Internet platforms are termed “Interactive Computer Services” and describe third-party intermediaries which host user-generated content. The term “Internet platform” is used to reflect these platforms as they have evolved away from just user-generated content toward the more rich content experience enjoyed today.

⁹ *Zeran v. AOL*, 129 F. 3d. 327(1997)

¹⁰ *Blumenthal v. Drudge*, 992 F. Supp. 44 (D.D.C. 1998)

¹¹ 141 Cong. Rec. H8470 (daily ed. Aug. 4, 1995) (Statement of Rep. Cox). (“We want to encourage people like Prodigy, like CompuServe, like America Online, like the new Microsoft network, to do everything possible for us, the customer, to help us control, at the portals of our computer, at the front door of our house, what comes in and what our children see. This technology is very quickly becoming available, and in fact every one of us will be able to tailor what we see to our own tastes.”).

¹² See, Eric Goldman, “The Ten Most Important Section 230 Rulings,” Tulane Journal of Technology and Intellectual Property (Vol. 20, Fall 2017) at p.3.

In *Blumenthal*, the court essentially agreed with the *Zeran* decision that Section 230 was intended as a broad immunity from conduit liability. Since enactment of the law, the range of services and content available on the Internet has changed significantly, and the size, scale, and influence of Internet platforms has grown and matured. Most notably, the nature of these platforms has adapted toward advertising-centric business models built upon user-generated content. It is now argued that once true, third-party intermediaries, major news and social networking platforms appear to no longer act as simple “pass-throughs.” Internet platforms are now seen creating their own unique “community guidelines,” which may limit what content is allowed on the platform. Moreover, algorithms, in combination with layered human reviews, are now enforcing these community guidelines.

2. Changes to the Communications Decency Act.

On November 30, 2017, the Subcommittee on Communications and Technology held a hearing on H.R. 1865, the Allow States and Victims to Fight Online Sex-Trafficking Act (FOSTA) of 2017,¹³ which was enacted into law.¹⁴ FOSTA is the first and only piece of legislation to amend CDA Section 230 since the original statute was enacted into law.¹⁵ Due to the Safe Harbor protections provided by CDA 230, it was hard to hold Internet platforms criminally (at the state level) or civilly liable for sex trafficking that was knowingly and willingly facilitated on their platforms.¹⁶ FOSTA amended CDA Section 230 to provide for a narrow exception to the Safe Harbor to hold Internet platforms accountable—only for sex trafficking.

B. Speech vs. Illegal Content

Online news and social networking platforms have emerged as an essential channel for communicating, free speech, and democratic participation. At the same time, the Internet platforms are seen taking a selective approach to assuming responsibility for the content on their platforms. By claiming CDA Section 230 immunity as an intermediary “pass-through,” platforms can make attempts to clean up some content while enjoying a safety net of immunity, giving them an option out from full responsibility. Ultimately, these platforms are empowered to exercise editorial judgement and act as a publisher while also claiming neutrality.

1. Illegal Content

As outlined earlier, CDA 230 was intended to provide both a sword and a shield. In the instances where an Internet platform is obviously facilitating illegal or illicit activity, Congress has expected Internet platforms to be accountable and use the “sword” they have been given. However, concerns have arisen that even when clear information is provided to platform operators, appropriate action is not always taken given the sheer amount of traffic on the Internet. One notable example of

¹³ Hearing entitled, “Latest Developments in Combating Online Sex Trafficking.” November 30, 2018. Available at: <https://energycommerce.house.gov/hearings/latest-developments-combating-online-sex-trafficking/>.

¹⁴ See, https://www.washingtonpost.com/news/true-crime/wp/2018/04/11/trump-signs-fosta-bill-targeting-online-sex-trafficking-enables-states-and-victims-to-pursue-websites/?utm_term=.39fad9e9ea70.

¹⁵ Other provisions of the original CDA Section 230 were deemed unconstitutional in. See, *Reno v. ACLU*, 521 U.S. 844 (1997).

¹⁶ H. Rept. 115-572.

such illegal content is the sale of opioids over Internet platforms.¹⁷ An FDA-sponsored Opioid Code-a-Thon challenge found “34 unique, live tweets that pointed to individual drug dealers, online pharmacies, and marketing affiliates” selling opioids.¹⁸

2. Speech: Community Standards, New Governors, and Content Moderation.

Armed with CDA Section 230 immunity, Internet platforms are enabled to self-regulate the content on their platform and police speech. In many ways, Internet platforms act as “New Governors,” setting policies¹⁹ they believe are in the “public interest,” much like other regulators.²⁰ Given Internet platforms’ increasingly prominent governance function as content moderators, their practices have implications for free speech in our society. Content is sometimes filtered or prioritized using proprietary algorithms, or other intellectual property, that are not subject to transparency requirements and thus, may not be well understood by the public. There are concerns about intentional or unintentional bias being built into these machine-based decision-makers during their development.²¹ Moreover, many controversial decisions regarding content moderation are made not by algorithms, but by employees enforcing or developing internal guidelines, which may or may not be publicly available. In the context of concerns about the diversity of the employees responsible for making these decisions, questions of bias, influence, and control are magnified.²²

A newer issue on this topic is algorithmic content moderation. Algorithms, at their root, are a tool; and their fault may be symptomatic of deeper issues with the people who create and use those tools. Algorithms are trained by humans and human-made datasets, and the data used to train an algorithm is a prime opportunity, wittingly or unwittingly, to inject bias from the start. Additionally, these algorithms can learn bias over time by observing data in the wild; and without proper oversight and attention, these biases may grow.

C. Issues.

While the liability protections afforded by CDA 230 may apply both in situations where Internet platforms apply content moderation to combat illegal content (*e.g.*, sale of illegal drugs, terrorist content, etc.) or to online speech generally, it appears that Internet platforms have, in many instances, benefitted from the “shield” without using the “sword” as intended. In re-examining CDA 230, Congress has been reviewing what constitutes an “interactive computer service” in today’s modern Internet experience.

¹⁷ See, <http://thehill.com/policy/healthcare/381611-fda-commissioner-urges-internet-providers-social-media-sites-to-curb>.

¹⁸ See, <https://www.buzzfeednews.com/article/janeltyvynenko/social-networks-are-losing-a-deadly-battle-with-illegal>.

¹⁹ See, <https://help.twitter.com/en/rules-and-policies/twitter-rules>.

²⁰ Kate Klonick, “The New Governors: The People, Rules, and Processes Governing Online Speech.” *Harvard Law Review*, April 2018. 1598-1670. Available at: https://harvardlawreview.org/wp-content/uploads/2018/04/1598-1670_Online.pdf.

²¹ See, <https://techcrunch.com/2017/04/30/algorithmic-accountability/>.

²² See, <https://qz.com/1047453/a-google-employees-viral-anti-diversity-memo-shows-americas-political-divide-has-spread-to-silicon-valley/>.

1. The Size of the Platform is Relevant.

The size, scale, sophistication, and influence of Internet platforms during the time CDA 230 was written is drastically different than today's Internet. While the liability protection for small, nascent Internet platforms in 1996 may have created the Internet we know today, the reality is that many Internet platforms today are much larger, some having market valuations nearing \$1 trillion dollars.²³ With such available resources, Internet platforms have come under greater scrutiny to use their "sword" and create accountability on their platform.

2. Internet Complexity.

In addition to the increasing size and sophistication of Internet platforms, the Internet's architecture has become more complex since CDA 230 was enacted. Whereas the 1996 law envisioned a simple world of "interactive computer services," today's Internet requires a more complex web of edge providers, content delivery networks (CDNs), ISPs, and others that have a distinct roles in creating today's Internet experience. In some instances, CDNs have played a very explicit and public role in moderating speech.²⁴

D. Regulatory Asymmetry.

Internet platforms make editorial judgements regarding: what content is and is not permissible, what content users do and do not see, and whether certain users are or are not allowed to exercise online speech, which can be viewed inconsistent with their status as third-party intermediaries. By contrast, traditional media companies are held accountable for the news content they publish online. This inconsistent treatment of Internet platforms and traditional media companies may impact both industry competition and consumer protection.

IV. STAFF CONTACTS

If you have any questions regarding this hearing, please contact Evan Viau, Bijan Koohmaraie, or Tim Kurth of the Republican Committee staff at (202) 225-3641.

²³ See, <https://www.statista.com/statistics/263264/top-companies-in-the-world-by-market-value/>

²⁴ See, e.g., <https://blog.cloudflare.com/terminating-service-for-8chan/> (describing network provider Cloudflare's decision to terminate service for the website 8Chan for failing to moderate hate-filled content).